IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.966 OF 2002

IN

SUIT NO.1065 OF 1981

Jagdish R.Singh ...Appellant.

vs.

1.Keki Rattansha Kalapesi & anr. ...Respondents.

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Mr.M.S.Khandeparkar with Mr.Amin i/b. M/s.B.Amin & Co., for Appellant.

Mr.Z.B.Kamdin with Ayaz Bilawala, Rajesh R. i/b. M/s.Bilawala & Co., for Respondent no.2.

**CORAM: D.K.DESHMUKH &**

**J.H.BHATIA, JJ.**

**DATED: 29th October,2007.**

**P.C**.:-

1. By this appeal, the appellant challenges the order dated 18.2.2002 passed by the learned Single Judge in Suit no.1065 of 1981. The appellant is the original plaintiff. He has filed civil suit claiming decree against defendant no.1. The defendant no.2 though was joined as defendant, no reliefs whatsoever were claimed against him. It appears that an application for amendment in the suit was made in the year 1982. That application was granted by order dated 11.3.1982. But though the amendment was granted, the amendment was not carried out. After almost 19 years, chamber summons no.1533 of 2001 was taken out for permitting the plaintiff to carry out amendment. That chamber summons was rejected by the learned Single Judge by order dated 22.1.2002. It appears that thereafter, the plaintiff took out chamber summons no.166 of 2002 seeking amendment in the plaint. Perusal of the chamber summons shows that the plaintiff was seeking leave of the Court to amend the plaint seeking decree against the defendant no.2.

When the suit came up before the Court on 18.2.2002, it appears from the order dated 18.2.2002 that the learned Counsel appearing for plaintiff pointed out to the Court that he has taken out chamber summons seeking amendment in the plaint, but the said chamber summons was not shown on board on that date. From the order impugned it appears that the Court without waiting for the chamber summons to appear on board and without considering and deciding that chamber summons, finding that in the suit there is no decree claimed against the defendant no.2 and as the suit has already been dismissed against the defendant no.1, has dismissed the suit against defendant no.2 also. The result was, the chamber summons taken out by the plaintiff for amendment in the plaint being chamber summons no.166 of 2002 rendered infructuous.

2. We have heard the learned Counsel appearing for both the sides. In our opinion, before dismissing the suit as against the defendant no.2 by order dated 18.2.2002, as admittedly the chamber summons no.166 of 2002 was taken out by the plaintiff seeking amendment in the plaint, Court should have considered

that chamber summons and it is only thereafter, the Court should have considered the question whether the suit survives or not. In this view of the matter therefore, the following order would meet the ends of justice:-

(i) The order impugned in the appeal dated 18.2.2002 is set aside. The learned Single Judge is requested to consider the chamber summons no.166 of 2002 taken out by the plaintiff and to pass order thereon in accordance with law, and thereafter consider the question whether the suit survives or not. The appeal is disposed of. No order as to costs.

(D.K.DESHMUKH, J.)

(J.H.BHATIA, J.)

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